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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH J. CICIPPIO

and

ELHAM CICIPPIO

and

DAVID JACOBSEN,

Petitioners,

vs.

ISLAMIC REPUBLIC, OF IRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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45 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals erred in interpreting the Commercial Activities Exception of the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(2) (1982), so as to negate subject matter jurisdiction over this action?

2. Whether the United States Court of Appeals erred in interpreting the Noncommercial Tort Exception of the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(5) (1982), so as to negate subject matter jurisdiction over this action?

PARTIES

All parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit are noted on the caption of this Petition.

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ISLAMIC REPUBLIC, OF IRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported, and appears in the Appendix at A-1. The Order of that Court appears in the Appendix at A-11. The Memorandum and Order of the District Court for the District of Columbia is unreported, and appears in the Appendix at A-12.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1994. This is an action which was instituted pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1602 *et seq*. The Petitioners are citizens of the United States of America. Respondent The Islamic Republic of Iran is a foreign sovereign whose activities outlined herein were outside the scope of immunity provided for by the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1602, *et seq*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. Section 1330, 1602-1611 (1982), provides in relevant part as follows:

Section 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of this title or under any applicable international agreement.

Section 1603. Definitions

For purposes of this chapter –

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Section 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of

enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Section 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state of personal injury or death, or damage to or loss of property, in the United States and caused by the tortious acto or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . . .

18 U.S.C. Section 1201. Kidnaping

(a) Whoever unlawfully seizes, confirms, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . shall be punished by imprisonment for any term of years of for life.

18 U.S.C. Section 1202. Ransom money

Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of Section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward,

shall be fined not more that $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. Section 1203. Hostage Taking

(a) . . . whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life.

STATEMENT OF THE CASE

On or about October 14, 1992, the Petitioners, Joseph Cicippio, Elham Cicippio and David Jacobson, filed a Complaint against the Respondent in the United Stated District Court for the District of Columbia, alleging various acts of terrorism including: kidnapping, assault and battery, torture, violation of international human rights, loss of consortium, intentional and/or negligent infliction of emotional distress. On or about January 29, 1993, Respondent filed a Motion to Dismiss alleging that the United States District Court did not have Subject Matter or Personal Jurisdiction to hear the claim.[1]

On or about February 26, 1993, the Petitioners filed their response with an accompanying Memorandum of Law. On March 18, 1993, an Order was entered by the Court granting Respondent's Motion to Dismiss.

Subsequently, on March 25, 1993, the Petitioners filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit.

On or about March 3, 1994, the Petitioners filed their brief in support of the Appeal. The Respondent

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1. The district Court did not decide the issue of whether it retained personal jurisdiction over the Appellee. See District Court Opinion of March 18, 1993.

filed its brief on or about April 4, 1994. The case was heard before Circuit Judges Wald, Silberman and Randolph on May 19, 1994. Judgment was entered against the Petitioners on July 29, 1994 and it is from this judgment of the Court of Appeals that is the subject of this Petition.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erred in determining that the Petitioners lacked subject matter jurisdiction on the basis that hostage taking is not a commercial act, constituting "commercial activity" under the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(2)(1982). The Opinion of the Court of Appeals directs that this issue is ripe for decision by this Supreme Court.

The Court of Appeals decision makes clear that this case is ripe for Supreme Court review as the issues therein should be resolved by this Court. The Opinion addressed the specific issue as to whether hostage taking itself can be described as a commercial activity without regard to the purpose of the activity:

> Appellants, relying on *Nelson*, assert that it can and should be so regarded. Because the Supreme Court in *Nelson* rested on the governmental status of the police alleged to have tortured the plaintiff, rather than the character of the act, one might believe that if those acts had been conducted on behalf of the Saudi government by contract thugs the Saudi government would not have enjoyed immunity under the Statute. Justice White, concurring, made exactly that point.

(Opinion at 6-7). The Court of Appeals labeled the Court's Opinion in *Nelson* "somewhat puzzling" and focused on the fact that "the Court aborted the hypothetical Justice White posed: We do not address the case where a claim [based on commercial activity] consists of

both commercial and sovereign elements [such as where private individuals had been employed to torture the plaintiffs]." (Opinion at citing *Nelson* at 1478 n.4). Thus, this case, which involves both commercial and sovereign elements, is ripe for decision by the Supreme Court so as to decide this issue for once and for all.

In the case herein, the alleged tortious conduct was not conducted by officials of the Iranian government, and therefore can not be dismissed upon the basis that the activities were entirely Sovereign in character. As such, the first issue to be addressed is whether the acts occurred in a commercial context.

(i) IRAN ENGAGED IN A PURELY PRIVATE ACTIVITY

In order to be classified as a commercial activity, Respondent's action must either be classified as "a regular course of commercial conduct or a particular commercial transaction or act". 28 U.S.C Section 1603(d). Further, "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

In the case of *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682 (1976), the Court opined that it would follow a "restrictive theory" of sovereign immunity. Under this theory, immunity is confined to those acts which involve a foreign state's public acts (*jure imperii*) and does not extend immunity to suits based upon a state's commercial or private acts (*jure gestiones*), *Rex v. CIA Pervana de Vapores, S.A.,* 660 F.2d 61 (3d Cir. 1981).

In order to determine whether a commercial act is private or public, many courts have determined that if the activity is one in which a private person could engage, it is not entitled to immunity. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 309 (2d Cir. 1981); *Republic of Argentina v.*

Weltover, 504 U.S. ___, 119 L.Ed. 2d 394 (1992), *Alfred Dunhill of London, Inc. v. Republic of Cuba.* 425 U.S. 682 (1976). Petitioners aver that Iran's activities were of the nature that private parties engage in exclusively. It is assumed that even the Respondent will not admit that its government, as part of its sovereign governmental function, engages in hostage taking, kidnapping and torture. These are purely private acts which are engaged in on a daily basis by private citizens. Taking the averments of Petitioners' Complaint as true, as required in considering a Motion to Dismiss, Petitioners are aware of no other government which would systematically take United States citizens as hostages for commercial gain. However, the practices of extortion and kidnapping, as well as placing oneself in an advantageous bargaining position, are the types of activities which private individuals would engage in on a daily basis in order to advance their own commercial needs. Moreover, the particular nature of the conduct alleged here – physical torture and arbitrary detention – is plainly unlawful and especially repugnant. That conduct alleged in Plaintiffs' Complaint is not of a kind to be lightly attributed to the sovereign's "exercise of the police power by a foreign state", particularly, as here, for the purpose of shielding that state's commercial enterprise.

Petitioners submit that if Iran were to purchase boots or bullets from an American corporation doing business abroad and were Iran to subsequently fail to pay for these goods, any action instituted by the corporation would fall under the commercial activities section. Why shouldn't Iran's abduction of the Petitioners fall under this exception? Iran was using the Plaintiffs in an effort to promulgate commercial transactions in this country: the movement of assets and arms from the United States to Iran. Without the use of Petitioners as its commodity of exchange, these transactions would not have been consummated. Plaintiffs in essence were being used as consideration for the sale of arms to

further Iran's commercial needs. Iran was selling hostages for profit.

Respondent has argued that activities such as assault, battery and unlawful detention cannot possibly fall within the purview of the FSIA because of their apparent criminal nature. Petitioners adamantly assert this argument is misplaced. *See Le Donne v. Gulf Air, Inc.*, 700 F.Supp 1400, 1409 (E.D. Va. 1988). Petitioners aver that while these activities are criminal, they have long since been used by private individuals in order to effectuate commercial activities. As evidence, Petitioners urge this Court to examine the Opinion of the District Court. The Honorable Thomas Penfield Jackson, in a footnote to his opinion states:

> History teaches, for example, that the Barbary pirates, who plundered shipping in the Mediterranean Sea from the 16th through the early 19th centuries, were a principle source of revenue for the North African sultanates under whose protection they sailed.

(Opinion of the lower court dated March 18, 1993, page 4)

Petitioners admit that the acts as alleged in their complaint (kidnapping, torture, assault) are universally regarded by most nations as "illegal." However, these are acts which private parties engage in on a daily basis for profit. In *Saudi Arabia v. Nelson,* 507 U.S. ___, 123 L.ED. 2d 47, 113 S.Ct. 1471, 1479 (1993), The Court opined that the focus, of whether a particular act is commercial in nature, is incumbent upon whether it is the type of conduct that a "private party engages in trade and traffic or commence." Assuming *arguendo*, the Petitioners were tangible assets, similar to those which exchanged on a daily basis throughout the world, and in fact they were subjected to the harm as alleged, they clearly would fit within the purview of the Act. Petitioners submit that they were detained by Iran in order to coerce the United States Government to "unfreeze"

assets which were located in the banks of the Country. In the eyes of the Defendant, Mr. Cicippio and Mr. Jacobson were valuable commodities that could be used as a method of exchange in order to promote the release of assets. In an archaic and inhumane sense, the detention of the Claimants in no way differs from the detention of any asset where payment has not been received by the "so called" aggrieved party. *See Transamerican S.S. v. Somali Democratic Republic,* 767 F.2d 998 (D.C. Cir. 1985).

Iran attempted in its lower Court Briefs to analogize the facts of *Nelson*, with the current action, stating "the pivotal facts in this case are on all fours with those in Nelson." Petitioners vehemently disagree with this assertion. In *Nelson*, a case dealing with the Saudi Government's incarceration and torture of an American working abroad, the Court deemed the actions of the Saudi Police "public", therefore not falling under Section 1605 (a)(2).

The Court opined, "The conduct boils down to abuse of power of its police by the Saudi Government . . . Exercise of the powers of the police and parol officers is not the sort of action by which private parties can engage in commerce." *Nelson, supra* 123 L.E.D. 2d at 61-62, 113 Sup. Ct. at 1480. This is not what Petitioners are or have alleged. *Nelson* deals with the Saudi Government using its police force to incapacitate an individual it deems a national security risk, or at the very least, a threat to the government run hospital by which Mr. Nelson was employed by. In the instant action, Mr. Cicippio and Mr. Jacobson are not alleged to be national security risks. To the contrary, they were working in Beirut, Lebanon for the America University of Beruit. Further, the Iranian Government did not use its Army, Police or other organized government security force to perform these actions; the radical militant group the

Hezbolah was used.[2] Accordingly, Petitioners submit that the private acts performed by the Defendant in the instant action can in no way be construed as analogous to those as outlined in *Nelson.*

Respondent has also attempted to analogize, that since private individuals can not "lawfully" engage in the conduct alleged by the Petitioners, it can not fall under the commercial activities exception to the FSIA. In support of this proposition Iran cites the following cases: *Letelier v. Republic of Chile*, 784 F.2d 790, 797 (2d. Cir. 1984), *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, and *Kline v. Kaneko,* 685 F.Supp. 386 (S.D. N.Y. 1988). As in *Nelson*, the cases cited by Iran are factually inapplicable to the current action.

The above cases all deal with the direct actions of a sovereign or a branch of the accused government. In the instant action, Iran through its agents, the Hezbolah, directed, financed and controlled the abduction of the Plaintiffs. This is analogous to a situation where a government hires an outside entity in order to perform a particular commercial task. Unfortunately in the instant action, the task was abduction and torture in order to effectuate the return of assets from the United States. Petitioners submit that it was the Respondent which chose the particular course of conduct they were going to employ in order to effectuate the alleged transactions. The Petitioners were merely the collateral that was unilaterally chosen by the Respondent. If, for example, the Iranian government had opted to detain goods of an American corporation in order to promote the release of the alleged assets, a cause of action would certainly arise under the FSIA. Accordingly, Petitioners submit they should at least be afforded the same opportunity for reparation.

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2. The Petitioners ask the court to take judicial notice of the recently released report of special prosecutor Lawrence Walsh linking the conduct alleged by the Plaintiffs to the Defendant.

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982), the court opined that if the activity is one in which a private party could engage, it is not entitled to immunity.

By using the hostages as leverage, the Iranian Government was able to consummate significant commercial transactions within this country. Accordingly, because Iran was involved in commercial transactions abroad that had a direct effect upon this country, it falls under the Commercial Activities Exception of the FSIA.

Respondent's Motion filed with the District Court failed to state that acts such as kidnapping, extortion and loss of employment opportunity are sovereign acts. Without any such defense, Petitioners' position must be taken as correct. Accordingly, because the "nature" of the acts which Defendant performed were purely private, the defense of sovereign immunity must fail.

Petitioners' Complaint is based upon a theory of hostage-taking as a form of commercial terrorism. Petitioners aver that they possess uncontroverted evidence linking the Iranians to their abduction. These abductions were carried out for the sole purpose of receiving monies and weapons from the United States. Respondent has completely failed to cite to any other government which systematically takes U.S. citizens as hostages and calls this a sovereign function. Therefore, if these acts can not be classified as public, they must be of a purely private nature, the type of which the FSIA's exceptions were meant to encompass.

(ii) IRAN'S COMMERCIAL ACTIVITIES HAD A DIRECT EFFECT UPON THIS COUNTRY

As previously stated, in order to sustain jurisdiction in this case, the court must find that the acts in which Iran engaged were of a private rather than a sovereign nature. Petitioners are certain that this matter has been adequately pled and proved. In addition, it must be

proven that these acts had a direct effect upon the United States. The House Report described the operation of the "direct effect" clause as applying to: "commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in Section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." [House Report No. 94-1487, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6618.] Section 18 of the Restatement provides in part: "a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if (iii) *it occurs as a direct and foreseeable result of the conduct outside the territory . . .*" In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. ___, 119 L.Ed.2d 394, 112 S.Ct. 2160, 2168 (1992), the Supreme Court opined,"an effect is direct if it follows an immediate consequence of the defendant's . . . . activity." Accordingly, Petitioners analysis now turns to whether an "immediate consequence" of Respondent's abduction, torture and confinement of Mr. Cicippio and Mr. Jacobson had a direct effect in this country.

In *Transamerican S.S. v. Somali Democratic Republic,* 767 F.2d, 998 (D.C. Cir. 1985), this Court held that a foreign agency's detention of a ship at its port and demand for payment in the United States met both the direct and substantial requirements of 1605(a)(2). The Court reasoned that due to the Somali Shipping Agency's insistence, a *significant transaction was effectuated in the United States, with an American corporation transferring $28,000 from a New York bank to the Somali government's Washington, D.C. bank.* Petitioners submit that the acts of the Somali shipping agency were analogous to those of Iran. Petitioners were detained at numerous locations throughout Lebanon, similar to the manner in which the Klos Leonhardt was held at the port in Kismayu. Further, the Klos Leonhardt was

not permitted to leave port until $28,000.00 was transferred from a United States Bank to a Somali Bank. Similarly, Petitioners Joseph Cicippio and David Jacobsen were not returned to their homeland until the U.S. government and U.S. Banks proffered millions of dollars in assets and weapons to Iran. Petitioners possess an abundance of evidence linking the Respondent to a systematic pattern of terrorism directed at promoting commercial transactions within this Country. The Court in *Transamerican* found that the acts of the Somali shipping agency were not only those which private individuals engage in, but also as having a substantial contact with this country. Accordingly, this Court should find Iran's actions similar to those of the Somali Shipping Agency and retain jurisdiction.

In *Nelson v. Saudi Arabia* 923 F.2d 1258 (11th Cir. 1991), a case involving the Saudi government's arbitrary detention and torture of a United States citizen, the court held that a "substantial contact" arose with this country due to Mr. Nelson's recruitment and hiring taking place within the United States.[3] Plaintiffs aver that the instant action provides even greater "substantial contact" than *Nelson*. The United States government was forced to expend over 35 million dollars, as well as hundreds of man-hours, to investigate the dealings between the government of Iran and this country. These expenditures, which were made possible through the citizens of this country, were directly and proximately the result of the Respondent's abduction of the Petitioners. Further, the United States Military was forced to move entire military groups into the region surrounding Lebanon in an effort to facilitate an end to this situation. Petitioners aver that the direct effect of this case herein ran not only to individuals but to our government,

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3. Subsequently the Supreme Court reversed the Eleventh Circuit's decision on the principal that the acts alleged by the Plaintiff amounted to nothing more than "an abuse of police power." *Saudi Arabia v. Nelson,* 113 S. Ct. 1471 (1993).

military and financial centers. This substantial contact clearly gives rise to jurisdiction under the commercial activities exception to the FSIA.

Not only were significant monies and weapons exchanged by the banks of this country to Iran, but monies were also paid to Elham Cicippio by the American University. During Mr. Cicippio's captivity, the American University of Beirut, an American corporation funded by the citizens of New York, continued to pay Mr. Cicippio's salary to his wife, Elham Cicippio. In turn, Mrs. Cicippio was forced to relinquish the monies to Mr. Cicippio's captors in order to gain his release. These activities caused a "direct effect" within the United States by causing the American University to relinquish thousands of American dollars to Elham Cicippio without receiving services in return and by forcing Mrs. Cicippio to turn over the monies to the captors. Further, when analyzing the direct effects which the Appellee's actions had upon the United States, this court must look to the difficulty Mr. Cicippio and Mr. Jacobson have met in obtaining employment within the country. Therefore, if this court determines that mere financial loss within this country is not sufficient to maintain an action, the emotional loss of not being able to find employment should be sufficient to place these Petitioners under the purview of the FSIA.

Moreover, Iran's activities do not lose their commercial character merely because they give rise to an action in tort rather than in contract. The FSIA contemplates that when a foreign state acts in its private or commercial capacity, it is subject to actions sounding in tort to the same extent as a private party. Section 1605(a)(2) is not limited by its terms to contract cases, but applies to "any case" in which the "action is based upon a commercial activity." The fact that Section 1605(a)(2) includes any tort case is unavoidably implied by the language of Section 1605(a)(5), which provides an exception to foreign state immunity in certain cases "not otherwise encompassed in paragraph (2) above, in

which money damages are sought against a foreign state for personal injury." See *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,* 905 F.2d 1375, 1388 (5th Cir. 1992). Accordingly, under Section 1605(a)(2), the courts have not hesitated to assert jurisdiction over commercial enterprises like Iran's, in actions based upon activities giving rise to liability in tort or contract. See *Arango v. Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1378-80 (5th Cir. 1980); *Sugarman v. Aeromexico, Inc.,* 626 F.2d 270, 273-75 (3d Cir. 1980).

In summation, this action must be read in the light most favorable to Petitioners. Using this standard, Petitioners have proven that Iran engaged in *commercial activities* sufficient for this court to retain subject-matter jurisdiction. Therefore, Respondent's argument of sovereign immunity under 28 U.S.C. 1604 is completely without merit and must fail.

2. The Court of Appeals erred in determining that the Petitioners lacked subject matter jurisdiction on the basis that the "Noncommercial Tort" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(5)(1982), does not apply. Further, the Court of Appeals affirmed the fact that the Supreme Court has not yet taken a position where tortious conduct occurring abroad causes injury in the United States such as the case presently before the Court.

Petitioners allege that if subject-matter jurisdiction does not exist under the "commercial activities" section, 28 U.S.C. 1605(a)(2) proper jurisdiction also presents itself under Section 1605(a)(5), the noncommercial tort exception. Section 1605(a)(5) provides that a foreign state is not immune from suit where money damages are sought against it "for personal injury or death, or damage to property, occurring in the United States." Although this Section of the FSIA has been interpreted as requiring both the injury and the act to occur in the

United States, Petitioners believe that such an interpretation is incorrect. In *Letelier v. Republic of Chile,* 488 F.Supp 663 (D.D.C. 1980), the Court stated:

> Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within the country, that circumstance alone will not allow it to absolve itself under the act of state doctrine if the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the FSIA by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act through the back door, under the guise of the act of state doctrine.

Petitioners aver this is the correct interpretation of the Noncommercial Tort Exception.

Respondent has relied upon the case of *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), *cert. denied,* 469 U.S. 881 (1984). The majority opinion in *Persinger* written by Judge Bork held that both the tort and the injury must have occurred in the United States. Petitioners respectfully represent that Judge Bork erred in his analysis of 28 U.S.C. 1605(a)(5). The dissenting opinion of Judge Edward states, "In particular, the statute plainly requires that *only the injury* (emphasis added) and not the tortious act or omission, occur in the United States. I see no reason to clarify the plain language of the statute." *Id.* at 844. Petitioners aver that the standard outlined in *Letelier* and the dissent of *Persinger* represents the proper analysis of the FSIA.

The Court of Appeals in its decision reached on July 29, 1994 pointed out the need for clarification with regard to what decision the Supreme Court would reach if faced with a case where the tortious conduct alleged occurred abroad but caused injury in the United States.

This is evident in the following excerpt from the Opinion of the Court of Appeals:

> The Supreme Court apparently reached the same result in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), although the matter is not entirely free from doubt and its statements on this point were in dicta. In the course of concluding that "because respondents' injury unquestionably occurred well outside the 3—mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply," *Id.* at 441 (emphasis added), the Court noted that the "tortious attack" on respondent's ship occurred outside the United States, id. at 440 (emphasis added), a statement that might imply that the tortious conduct, as well as the injury, must occur within the United States. The Court, however, might simply have relied on the location of the attack as grounds for concluding that the "injury" occurred outside the United States. At any rate, having concluded that Amerada Hess' injury did not occur in the United States—a requirement explicitly imposed by the FSIA—any statements about where the tortious conduct occurred were dicta. *It is therefore still unclear what position the Supreme Court would take if faced with a suit alleging tortious conduct occurring abroad that caused injury in the United States.* (emphasis added).

(Opinion at 8-9). The Petitioners therefore request that this Supreme Court determine as a matter of law that the Petitioners have subject matter jurisdiction on the basis that the noncommerical tort exception is applicable, despite the fact that the tortious conduct occurred outside of the United States.

Assuming that Judge Edward's analysis in *Persinger* is correct, what, if any, injury took place in the United States? As a result of Respondent's action, Petitioners Joseph Cicippio and David Jacobson were prevented

from returning to the United States. Further, as a result of the Defendant's influence, Petitioner Elham Cicippio was prevented from traveling from Beirut to the United States. Additionally, the families of both Mr. Jacobson and Mr. Cicippio were forced to suffer throughout their captivity.
(Plaintiffs Complaint at 14).

If this court follows its previous analysis in *Letelier*, it must retain subject-matter jurisdiction over this matter on the grounds that Respondent's actions fell under purview of 28 U.S.C. 1605(a)(5).

CONCLUSION

In light of all of the foregoing arguments contained within this Petition as well as startling revelations which are breaking on a daily basis, this Court should reverse the Court of Appeal's Order of July 29, 1994 and submit the Islamic Republic of Iran to the Jurisdiction of the District Court.

Respectfully submitted,

MURPHY & OLIVER, P.C.

BY: _____

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Dated: October 24, 1994

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 19, 1994 Decided July 29, 1994

No. 93-7047

JOSEPH J. CICIPPIO, ELHAM CICIPPIO,
DAVID JACOBSON,
APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(92cv2300)

James Godin, of the Bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of the Court, argued the cause for appellants. On the briefs for appellants was *Barbara A. Barnes*.

Bruno A. Ristau argued the cause and filed the brief for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, SILBERMAN, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* Appellants appeal from the district court's order dismissing their action against the Islamic Republic of Iran for lack of subject matter jurisdiction. Concluding that kidnapping is not, by its nature, a commercial act, that dealings directly between two sovereign states do not constitute "commercial activity" within the meaning of the Foreign Sovereign Immunities Act, and that the "noncommercial tort" exception does not apply, we affirm.

I.

This case arises out of the well-publicized abductions of appellants Joseph Cicippio and David Jacobson in Lebanon.[1] Appellants' complaint alleges that while working in Lebanon, Cicippio and Jacobson were abducted by Islamic fundamentalists hired by the State of Iran and held by those agents for an extended period of time, during which they were tortured.[2] Iran conditioned the release of Cicippio and Jacobson on the return of Iranian assets frozen in this country by the United States government. That abduction, it is also alleged, caused direct effects in the United States through the emotional harm suffered by the victims' families, the payment of monies to the captors by Mrs. Cicippio, and the unfreezing of Iranian assets. Jacobson and Cicippio, on the basis of these factual allegations, sought damages for a number of intentional torts and for violations of international law. They invoked the "commercial activity" and the "noncommercial tort" exceptions to the Foreign Sovereign Immunities Act (FSIA) as bases for federal court jurisdiction.

Appellee, the Islamic Republic of Iran, moved to dismiss the suit on grounds that the court lacked subject matter jurisdiction under the FSIA as well as personal jurisdiction

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[1] Appellants include Cicippio's wife, Elham Cicippio, as well.

[2] In reviewing an order dismissing for lack of jurisdiction under FED. R. CIV. P. 12(b)(1) we take all well-pleaded facts as true.

over the defendant. The district court granted the motion to dismiss on lack of subject matter jurisdiction. It concluded that although Iran's alleged actions did appear to constitute "commercial activity" within the meaning of the FSIA—at least under the Supreme Court's analysis—"state-supported kidnapping, hostage-taking, and similar universally criminal ventures were simply not the sorts of proprietary enterprises within the contemplation of Congress when it enacted the 'commercial activity' exception to [the] FSIA." This appeal followed.

II.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* (1988), provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604 (1988). The Act does create, however, a number of exceptions to this immunity. Two are invoked here: the "commercial activity" and the "noncommercial tort" exceptions. *See* 28 U.S.C. §§ 1605(a)(2), 1605(a)(5) (1988). We consider them in turn.

A.

The Act permits a suit against a foreign government to proceed in any case

> in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or *upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (1988) (emphasis added). Appellants rely on the third clause of this subsection; *i.e.*, they claim that the government of Iran committed an act in connection with commercial activity elsewhere. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28

U.S.C. § 1603(d) (1988). The subsection further directs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* We have not a little difficulty in understanding appellants' precise theory of the case because they do not clearly identify which of the allegations is the "act" and which makes up the "commercial activity". As best we can determine, appellants treat "hostage taking for profit" as both the act and the commercial activity. In other words, appellants do not specifically claim that the freezing or prospective unfreezing of Iranian assets (or the payments made by Cicippio's relatives) to gain his release constitute commercial activity, and that the kidnapping is an act in connection with that transaction. Instead, appellants present the situation as one integrated activity of a commercial nature which suggests that they should be suing under the first clause. We assume, however, that appellants are implicitly claiming that one of the acts relating to the abduction takes place "elsewhere" from the commercial activity. We therefore consider whether a foreign sovereign's alleged use of non-official agents to conduct alleged hostage takings to gain economic advantages can be considered a commercial activity.

The Supreme Court first had occasion to apply the FSIA's phrase "commercial activity" in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992). There the government of Argentina had issued bonds payable in dollars to support its guarantee of payments of loans its domestic borrowers took from foreign creditors. When the Argentine government unilaterally extended the time of payment it was sued in New York (where payment was to be made) by foreign creditors. Drawing on the legislative history of the FSIA, as well as on the pre-Act practice of the State Department, the Court

> conclude[d] that when a foreign government acts, not as regulator of a market, but in the *manner* of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA.... [T]he issue is whether the particular actions that the foreign

> state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce." Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private parties can similarly use sales contracts to acquire goods.

Weltover, 112 S. Ct. at 2166 (citations omitted) (emphasis added). The government of Argentina, recognizing that the statute made its purpose irrelevant, nevertheless argued that one could not ignore the context in which it issued the bonds—which was in order to enhance the ability of its citizens to borrow foreign capital, not like the ordinary commercial issuance of debt to raise capital or refinance debt. The court assumed *arguendo* that the notions of context and purpose might be different but rejected Argentina's argument because the bonds had been issued, just as might be done by a private actor, to restructure the government's existing obligations. Putting aside for now the relationship between purpose and context, we take from *Weltover* the key proposition that in determining whether a given government activity is commercial under the act, we must ask whether the activity is one in which commercial actors typically engage.

Appellants insist that this formulation does not mean that when a sovereign is alleged to have engaged in *illegal* activities such activities should be thought not commercial *per se*. The Second Circuit had earlier determined that kidnapping (and assassination) could not be considered commercial activities under FSIA because a private person could not engage in such activity *lawfully*. *See Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984). Appellants point out, however, that all causes of action can be thought, in some sense, to accuse a defendant of acting unlawfully, and the distinction between tortious and criminal acts is not always clear.

The most recent FSIA Supreme Court decision, *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), may well undermine the Second Circuit's categorical approach. There an American plaintiff hired in the United States to work in a Saudi hospital claimed that he had been wrongly imprisoned and tortured by Saudi police in retaliation "for his whistle blowing" directed at certain hospital practices. Although the Second Circuit's approach offered the most obvious line of analysis, the Court did not take it. Instead, the Court concluded that since the basis of the claim was the alleged tortious—perhaps criminal—actions of the Saudi police (not the arguably commercial activity in recruiting Nelson), and private parties cannot exercise that "*sort*" of power while engaging in commerce, the activity could not be thought "commercial." [3]

The Court dismissed the contention that the Saudi government typically uses such techniques to resolve commercial disputes by emphasizing that the "powers allegedly abused were those of police and penal officers" and noting that "[i]n any event the argument is off the point, for it goes to purpose." 113 S. Ct. at 1480. The last observation, it seems to us, makes abundantly clear, on top of the statute and *Weltover*, that in this case we cannot consider the alleged motive of the Iranian government in determining whether appellants' claim if true would involve commercial activity. It is to the character and type of activity to which we should look; purpose must be disregarded and a plaintiff cannot, by describing the act in question as intertwined with its purpose, avoid the statutory preclusion. That leaves the issue whether the hostage taking itself can be described as a commercial activity—without regard to its purpose.

Appellants, relying on *Nelson*, assert that it can and should be so regarded. Because the Supreme Court in *Nelson* rested on the governmental status of the police alleged to have tortured the plaintiff, rather than the character of the

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[3] The claim was brought under Clause 1 of the Act so the Court did not consider whether the torture could be regarded as an act in connection with the commercial activity of operating the hospital.

act, one might believe that if those very acts had been conducted on behalf of the Saudi government by contract thugs the Saudi government would not have enjoyed immunity under the statute. Justice White, concurring, made exactly that point. 113 S. Ct. at 1481, 1482.

We do not think, however, that appellants (or Justice White) correctly read the Court's opinion—which, admittedly, is somewhat puzzling.[4] The Court never conceded the validity of Justice White's supposition. By focusing on the status of the perpetrators, the Court avoided the hypothetical Justice White posed: "we do not address the case where a claim [based on commercial activity] consists of both commercial and sovereign elements [such as where private individuals had been employed to torture the plaintiffs]. We do conclude, however, that where a claim rests entirely upon activities sovereign in character—as here—jurisdiction will not exist under the clause regardless of any connection the sovereign acts may have with commercial activity." *Id.* at 1478 n.4 (internal citation omitted).

In our case, since we cannot say that the alleged tortious conduct rests entirely upon activities sovereign *in character,* because the kidnappers are not alleged to have been officials of the Iranian government, we cannot dismiss appellants' claim on that basis. On the other hand, to accept appellants' claim would be to declare that all such acts, regardless of context, sponsored openly or covertly by a sovereign power are outside the immunity granted by the FSIA unless conducted directly by acknowledged government officials. We think that cannot be what Congress intended. Although the purpose and perhaps the illegal character of the alleged acts are irrelevant in judging their commercial character, to return to the notion assumed *arguendo* in *Weltover,* the context in which the acts take place must be germane. Even Justice White, who thought the allegations in *Nelson* did make out a

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[4] Justice White accused the majority of a "single minded focus on the exercise of police power, [which] while simplifying the case hardly does it justice." 113 S. Ct. at 1482–83. The majority's focus does seem a bit artificial.

claim of commercial activity, rested his view on the commercial character of the hospital where Nelson was employed. 113 S. Ct. at 1481–82. Unless an act takes place in a commercial context it would be impossible to determine whether it is conducted in the manner of a private player in the market. Otherwise, any act directed by a foreign government and carried out by irregular operatives in whatever circumstances could be thought commercial including isolated acts of assassination, extortion, blackmail, and kidnapping (for, perhaps, the sexual pleasure of a depraved monarch). That can hardly be what Congress meant by commercial activity nor what the *Weltover* Court thought were typical acts of market participants.

Insisting that a given act be judged in context before concluding whether it is commercial activity is not inconsistent with eschewing consideration of purpose. The provision of the statute which requires us to ignore purpose was obviously designed to prevent the foreign sovereign from casting a governmental purpose, which always can be found, as a cloak of protection over typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts that are grist for John Le Carre novels. Here the kidnapping *by itself* cannot possibly be described as an act typically performed by participants in the market (unless one distorts the notion of a marketplace to include a hostage bazaar). That money was allegedly sought from relatives of the hostages could not make an ordinary kidnapping a commercial act any more than murder by itself would be treated as a commercial activity merely because the killer is paid. Perhaps a kidnapping of a commercial rival could be thought to be a commercial activity. If so, it would not be because the kidnappers demanded a ransom, but because the kidnapping took place in a commercial context.

There remains the question whether the kidnapping can be thought as an act, not itself a commercial activity, but taken in connection with commercial activity elsewhere. The commercial activity under that reading would be presumably, the Iranian government's continued effort to gain the unfreezing

of its assets in the United States.[5] We do not think, however, that those efforts are properly regarded under the Act as commercial. The United States government was acting purely as a sovereign regulator when it froze the assets of Iran and its citizens, and the government of Iran's alleged efforts to release the freeze were likewise peculiarly sovereign. When two governments deal directly with each other *as governments,* even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace. Governments negotiating with each other invariably take into account non-marketplace considerations—most obviously political relations—and so they cannot be thought to be behaving, in that setting, as businessmen.[6]

B.

Appellants alternatively invoke the "noncommercial tort" exception to the FSIA. That exception, codified at 28 U.S.C. § 1605(a)(5), provides that a foreign state shall not be immune in any case "in which money damages are sought against a foreign state for personal injury ... occurring in the United States and caused by the tortious act or omission of that foreign state...." We have held that this exception requires that both the tortious act as well as the injury occur in the United States. *See Persinger v. Islamic Republic of Iran,* 729 F.2d 835, 842 (D.C. Cir. 1984).[7] Appellants criticize

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[5] As we have already noted ordinary kidnapping for ransom is not a commercial activity so the alleged request that Cicippio's wife pay money for his return adds nothing.

[6] We, therefore, need not decide whether there were "direct effects" in the United States.

[7] The Supreme Court apparently reached the same result in *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428 (1989), although the matter is not entirely free from doubt and its statements on this point were in *dicta.* In the course of concluding that "[b]ecause respondents' *injury* unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of

that opinion, but we are of course bound by it. There is no dispute that the tortious actions of which appellants complain occurred in Lebanon. Accordingly, the noncommercial tort exception to the FSIA's grant of immunity is inapplicable.

* * * *

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

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the United States, the exception for noncommercial torts cannot apply," *id.* at 441 (emphasis added), the Court noted that the "tortious *attack*" on respondent's ship occurred outside the United States, *id.* at 440 (emphasis added), a statement that might imply that the tortious conduct, as well as the injury, must occur within the United States. The Court, however, might simply have relied on the location of the attack as grounds for concluding that the "injury" occurred outside the United States. At any rate, having concluded that Amerada Hess' injury did not occur in the United States—a requirement explicitly imposed by the FSIA—any statements about where the *tortious conduct* occurred were *dicta*. It is therefore still unclear what position the Supreme Court would take if faced with a suit alleging tortious conduct occurring abroad that caused injury in the United States.

MANDATE
Pursuant to the provisions of Fed. R. App.Pro.41(a)
ISSUED: September 26, 1994
BY: E. Brown, Deputy Clerk
ATTACHED: ___ Amending Order
Opinion
Order on Costs
USDC CV 92 2300

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7047 **September Term, 1993**

Joseph J. Cicippio,
Elham Cicippio, David Jacobson,
Appellant,

v.

Islamic Republic of Iran,
Appellee

United States Court of Appeals
For The District of Columbia
Circuit

FILED JUL 29 1994

RON GARVIN
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Wald, Silberman and **Randolph,** Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Date: July 29, 1994

Opinion for the Court filed by Circuit Judge Silberman.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH J. CICIPPIO, et al. *Plaintiffs,*	:	
v.	:	Civil Action No. 92-2300
ISLAMIC REPUBLIC OF IRAN, *Defendant*	:	

MEMORANDUM AND ORDER

Plaintiffs Joseph Cicippio and David Jacobson are U.S. citizens who were kidnapped in Beirut, Lebanon, in 1985-86 and held in captivity somewhere in Lebanon for over five and nearly two years, respectively. They (and Cicippio's wife, a Libyan national) have brought this action against the Islamic Republic of Iran ("Iran"), a foreign state, to recover damages for their ordeal. Iran has moved to dismiss the complaint, in advance of answer, for, *inter alia,* a failure of subject matter jurisdiction in federal court.[1]

Plaintiffs predicate their allegation of subject matter jurisdiction, as they must, on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 *et seq.*, ("FSIA"), now recognized as the exclusive authority for the assertion by a United States court of subject matter jurisdiction over an action against a foreign state. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

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1. The disposition made of this motion on the grounds stated makes it unnecessary to address Iran's objections to service of process and its arguments respecting constitutional limitations on *in personam* jurisdiction over it as a defendant without sufficient "minimum contacts" with the forum.

Subject to certain exceptions, the FSIA declares that a foreign state "shall be immune from the jurisdiction of the courts of the United States and of the States . . . . ." 28 U.S.C. § 1604. The exceptions to that general rule of immunity upon which plaintiffs rely here are found at 28 U.S.C., §§ 1605(a)(1), 1605(a)(2), and 1605(a)(5), which allow federal courts to exercise jurisdiction over foreign states when the foreign state has "waived" its immunity to suit; when the action arises out of certain "commercial activit[ies]" of the foreign state; and when a non-commercial "tortious" act or omission of the foreign state causes personal injury or property damage to "occur [ ] in the United States."

The first and third of these exceptions, as jurisdictional bases here, are quickly eliminated by the Supreme Court's ruling in *Argentine Republic* v. *Amerada Hess Corp., supra,* holding that Argentina, a foreign state, could not be sued in U.S. courts for its unprovoked military air strike that resulted in the destruction of a neutral's oil tanker on the high seas during Argentina's war with Great Britain over the Falkland Islands. The various international agreements to which Argentina was a party, and which specified certain substantive rules of conduct to which the signatories would adhere, did not represent "waivers" of Argentina's right to claim immunity from suit in U.S. courts for its failure to adhere to them. 488 U.S. at 442-43. The same is true of the various compacts and accords alleged by plaintiffs Cicippio and Jacobson to obligate Iran to refrain from the conduct those agreements purport to renounce. Iran has never agreed to be sued for reneging on them in the United States. Nor did the fact that the tanker destroyed by Argentina in *Amerada Hess* was destined eventually to transport oil for consumption in the United States occasion actionable personal injury or property damage in the United States. *Id.* at 441. To the same effect, Cicippio and Jacobson allege that they were taken and held prisoner in Lebanon, not the United States.

It is the second of the FSIA exceptions cited above, and also invoked by plaintiffs to sustain this Court's jurisdiction, that the Court finds most troublesome. Plaintiffs allege, and insist that they can prove, that Iran embarked upon a particularly grisly form of commercial activity that they describe as "commercial terrorism." Cicippio and Jacobson assert that Iran regards hostages as articles of commerce, and that it offers (and in their case did offer) to trade captives seized by Iranian agents in Lebanon for more conventional commodities, i.e., military supplies; for money, i.e., sums paid by Mrs. Cicippio to her husband's captors; and for financial concessions, i.e., the release of frozen Iranian assets in the United States. They allege that the United States government did, however reluctantly, finally accept the offers – in their own cases it returned assets located in the United States to Iran in exchange for their freedom – and thus the United States became a party to a somewhat sordid but nevertheless "commercial" transaction, and one indisputably having a "direct affect in the United States." The consequence, they say, is that Iran is amenable to suit in a United States district court under 28 U.S.C. § 1330(a), and that it possesses no immunity to suit. Having caused Cicippio and Jacobson, and others, to be seized and held for barter, Iran was engaged in a "commercial activity" within the ambit of 28 U.S.C. § 1605(a)(2).

Although trafficking in persons and property captured by sovereign entities solely for profit is certainly not unknown within the international community,[2] this Court is of the opinion that state-supported kidnapping, hostage-taking, and similar universally criminal ventures were simply not the sorts of proprietary enterprises within the contemplation of Congress when it enacted

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2. History teaches, for example, that the Barbary pirates, who plundered shipping in the Mediterranean Sea from the 16th through early 19th centuries, were a principal source of revenue for the North African sultanates under whose protection they sailed.

the "commercial activity" exception to FSIA in conferring jurisdiction upon federal courts to entertain cases against foreign sovereigns. It will, therefore, dismiss the complaint. The implications of a contrary ruling would extend far beyond the circumstances of this case.[3]

Nevertheless, the issue appears neither to have been addressed before nor is it easily resolved by reference to contemporary authority. To illustrate, the Court observes that, in determining whether a foreign state is engaging in jurisdictionally sufficient "commercial activity" under the FSIA, Congress has expressly directed that the conduct in question be gauged by its "nature" and not its "purpose." 28 U.S.C. § 1603(d). The Supreme Court has instructed, in its most recent case to have considered the meaning of the term "commercial activity" in an FSIA context, that the jurisdictional inquiry to be made pursuant to § 1603(d) must be as to whether the transaction at issue is such as is customarily pursued by private parties for economic gain or advantage. *Republic of Argentina* v. *Weltover,* __ U.S. __, 112 S.Ct. 2160, 2160-65 (1992) (issuance of debt instruments a "commercial activity" of a foreign state for jurisdictional purposes under FSIA). Employing just such an analysis in this case, it must be acknowledged that private "entrepreneurs," as well as nations, can and do hold hostages for ransom, offering to trade their safety or liberty for valuable consideration.

Since this case cannot proceed further without a definitive resolution of this threshold issue, and deserves early consideration by an appellate court, it is, therefore, this 18th day of March, 1993.

ORDERED, that the motion of defendant Islamic Republic of Iran to dismiss the complaint for want of

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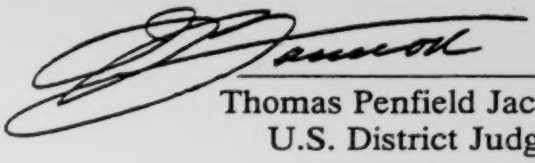
3. *Quaere*: Would allegations of a goverrment's official complicity in drug-smuggling, gun-running, industrial espionage or sabotage, or bribery constitute "commercial activity" sufficient to support a private action against a foreign state cognizable under the FSIA in federal court if it could be shown to have been lucrative?

subject matter jurisdiction is granted, and the complaint is discussed without prejudice.



Thomas Penfield Jackson
U.S. District Judge

Supreme Court, U.S.
FILED
NOV 22 1994
OFFICE OF THE CLERK

(2)

No. 94-730

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOSEPH J. CICIPPIO, *et al.*,
Petitioner,

v.

ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October term, 1994

No. 94-730

JOSEPH J. CICIPPIO, *et al.*
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and order entered by the United States District Court for the District of Columbia (Pet. App. A-13 - A-17) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A-1 - A-10) is reported at 30 F.3d 164 (1994).

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994 (Pet. App. A-11 - A-12). The petition for a writ of certiorari was filed on October 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Invoking the district court's jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1330, 1602 *et seq.*,[1] Joseph J. Cicippio, his wife Elham, and David Jacobson ("petitioners") brought suit against the Islamic Republic of Iran ("Iran") for tortious injury suffered in Lebanon. Their complaint alleged that in 1985 and 1986 Iran, "through its agents and servants . . . promoted, financed [and] directed" the capture and detention of petitioners Joseph Cicippio and Jacobson in Lebanon. (Complaint ¶¶ 4-5). Petitioners sought damages for numerous wrongs inflicted on them in Lebanon including kidnapping, physical abuse, false imprisonment, violation of international human rights and loss of past and future job opportunities with their employer, the American University in Beirut. (*Id.* ¶¶ 22-37 and 50-58). The complaint further alleged that the taking of hostages "are activities which governments do not normally and

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[1] For ease of reference, we refer in this brief only to the sections of the FSIA as codified in Title 28, U.S.C.

cannot lawfully undertake," and that "the acts of Iran were not sovereign, but were wrongful acts of a commercial nature." (*Id.* ¶ 6).

Petitioner Elham Cicippio, who throughout the period of her husband's detention remained in Beirut, sought damages for loss of her husband's consortium, infliction of emotional distress and mental impairment. (*Id.* ¶¶ 42-49). The six causes of action set forth in the complaint sought damages totaling in excess of $600 million.

Iran appeared and filed a motion under Rule 12(b), F.R.Civ.P.,to dismiss the suit for lack of subject matter and personal jurisdiction.[2]

The district court granted the motion and dismissed the complaint for lack of subject matter jurisdiction under the FSIA. It ruled that hostage taking is not the kind of "commercial activity" contemplated by Congress when it enacted the "commercial activity" exception to foreign sovereign immunity, §1605(a)(2). (Pet. App. A-15). It further held that petitioners' reliance on the non-commercial tort exception to sovereign immunity, §1605(a)(5), was misplaced, since none of Iran's alleged tortious acts occurred in the United States or caused

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[2] Solely for purposes of its jurisdictional motion in the district court, Iran was required to accept the well-pleaded facts in the complaint. Counsel, however, has been asked respectfully to inform the Court that Iran had no involvement in petitioners' detention in Lebanon and that the Government of Iran emphatically rejects the baseless allegations of the complaint.

injury to the petitioners in the United States as required by §1605(a)(5). (Pet. App. A-14).

On appeal, the court below affirmed the district court's lack of subject matter jurisdiction. It cited and relied on dispositive case law from this Court establishing that neither the commercial activity exception to foreign sovereign immunity, *Saudi Arabia v. Nelson*, 113 S.Ct. 1471 (1993); *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992) (Pet. App. A-5 - A-7), nor the non-commercial tort exception, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), could serve as jurisdictional predicates for this suit.

SUMMARY OF ARGUMENT

1. The court below correctly ruled that the kidnapping and detention of petitioners Joseph Cicippio and David Jacobson "byitself cannot possibly be described as an act typically performed by participants in the market (unless one distorts the notion of marketplace to include the hostage bazaar)." (Pet. App. at A-8). In *Weltover*, the Court ruled that in the context of foreign sovereign immunity the term "commercial" refers to the type of actions "by which a private party engages in 'trade and traffic or commerce'." 112 S.Ct. at 2166, citing Black's Law Dictionary. Kidnapping and imprisonment are plainly not the means by which private parties engage in commercial activities.

Petitioners urge, in the alternative, that the tortious

and criminal acts committed by supposed agents of Iran in Lebanon should be regarded as "commercial" in nature because they were done for the purpose of securing the return of Iran's frozen properties and to induce the United States government to sell arms to Iran. The argument, however, is refuted by the FSIA's express provision that the purpose which motivates a foreign state to engage in a commercial activity is not germane to a determination whether the act is commercial in nature; it is the character of the act alone that is of jurisdictional significance.

Petitioners also wholly failed to show that the injuries they suffered in Lebanon had any direct effect in the United States, as required by the third clause of the commercial activity exception on which they seek to rely.

2. The court below was also correct in ruling that the non-commercial tort exception to sovereign immunity did not vest subject matter jurisdiction in the district court over the torts allegedly committed by Iran's operatives in Lebanon when they took petitioners hostage in Lebanon. Nor did the wife's claim for loss of consortium and emotional suffering in Lebanon fall within the non-commercial tort exception to sovereign immunity because the injury she claims to have suffered was suffered in Beirut, not in the United States. The FSIA provides on its face that, to be actionable, a non-commercial tort committed by a foreign state must be one that has "occurr[ed] in the United States." §1605(a)(5). The *Amerada Hess* Court squarely held that Congress intended the FSIA's tort exception to be limited to torts occurring

in this country, 448 U.S. at 440-441.

The decision below is fully consistent with the statutory scheme of the FSIA and this Court's interpretation thereof, and the petition presents no occasion for review by this Court.

ARGUMENT

I. THE CLAIMED HOSTAGE-TAKING BY IRAN DID NOT CONSTITUTE A "COMMERCIAL ACTIVITY" WITHIN THE MEANING OF THE FSIA, NOR DID THE HOSTAGE-TAKING CAUSE A "DIRECT EFFECT" IN THE UNITED STATES

Petitioners asserted below that Iran orchestrated their detention in Lebanon in an effort to use them as a bargaining chip to purchase arms from the United States and to secure the release of frozen property in the United States. They claimed that Iran thereby engaged in a commercial activity as defined in §1603(d) of the FSIA.[3] The assertion finds no support in the FSIA or in case law applying the restrictive doctrine of foreign sovereign immunity.

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[3] The petition reproduces almost verbatim the convoluted arguments that petitioners advanced in their brief below (Pet. 12-14), and that the court of appeals had considerable difficulty in following (Pet. App. A-4). Petitioners, however, fail to inform the Court of the reasons why the court of appeals rejected their arguments (see Pet. App. A-4 - A-5).

Under the restrictive doctrine as incorporated in the FSIA, a foreign state is denied immunity from suit for acts performed, or that cause a direct effect, in the United States if the acts are private or commercial in character (*acta jure gestionis*). §1605(a)(2). *Saudi Arabia v. Nelson,* 113 S.Ct. at 1479; *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487 (1983). The FSIA directs that inquiries as to the character of a state's acts are to focus on the *nature* of the act rather than on its purpose, §1603(d). This Court has stated that as a guide to determining whether a given activity is "commercial," the question that should be posed is whether a private party would customarily carry on such activity for profit. *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. at 2166.; *Restatement (Third) of the Foreign Relations Law of the United States* §451 (1987) (foreign states are immune from the jurisdiction of our courts, except with respect to claims arising out of activities of the kind that may be carried on by private persons).

Contrary to petitioners' assertions, state-sponsored kidnapping and hostage-taking, no matter for what purpose it may be done, is not *by its nature* a commercial activity. A suit based on alleged kidnapping is not "a suit based upon a foreign state's participation in the market-place in the manner of a private citizen or corporation." *Weltover*, at 2166. Whether Iran's claimed conduct amounted to "hostage-taking for profit" (Pet. 9) is irrelevant to an analysis of the *nature* of the conduct. The *Nelson* Court emphasized in an analogous context, whether a state acts "in the manner of a private party" is a question of behavior, not motivation:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to the abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. [Citations omitted]. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." (Citations and quotation marks omitted).

113 S.Ct. at 1479-80.

Even before this Court spoke in *Nelson*, lower courts' decisions firmly established that murder, kidnapping, hostage-taking and wrongful detentions were *not* the type of activities that are customarily carried out for profit by private persons.[4] Petitioners'

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[4] *See, e.g., Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (state-sponsored terrorism and politically motivated assassinations are not traditionally the function of private individuals and cannot be considered commercial in nature), *cert. denied*, 464 U.S. 815 (1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.) (murder, no matter what its purpose, does not partake of the

characterization of Iran's alleged conduct as private and commercial within the purview of the FSIA, Pet. 8-9, simply does not bear scrutiny.

Petitioners' failure to establish that Iran engaged in a commercial activity renders inconsequential the second prong of their argument, *viz.*, that Iran's claimed commercial acts in Lebanon had a "direct effect" in the United States – a showing required by the third clause of the commercial activity exception, §1605(a)(2).

Although they accurately quote the *Weltover* Court's holding when an effect is "direct"[5] (Pet. 12), petitioners' attempted showing that Iran's claimed kidnapping had a "direct effect" in the United States is, to put it charitably, far off the mark. Thus, they say that "[p]etitioners Joseph Cicippio and David Jacobson were not returned to their homeland until the U.S. government and U.S. Banks [*sic*] proffered millions of dollars in assets and weapons to Iran." (Pet. 13). They claim that "[t]he

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nature of a commercial activity), *cert. denied*, 469 U.S. 1035 (1984); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (alleged kidnapping by a foreign state is not commercial activity under the FSIA), *cert. denied, sub nom. Arango v. Compania Dominicana de Aviacion*, 474 U.S. 995 (1985); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D.N.Y. 1988) ("commercial activity" exception to sovereign immunity does not apply to Mexico's expulsion of an alien; even if activity in question amounted to kidnapping or abduction, as plaintiffs urged, such activity would not amount to commercial activity, because a private person cannot lawfully engage in kidnapping and abduction).

[5] "An effect is direct if it follows as an immediate consequence of the defendant's activity." 112 S.Ct. at 2168 (ellipsis and quotation marks omitted).

United States government was forced to expend over 35 million dollars, as well as hundreds of man-hours, to investigate the dealings between the government of Iran and this country." (*Ibid.*). They further claim that "the United States Military was forced to move entire military groups into the region surrounding Lebanon in an effort to facilitate an end to this situation." (*Ibid.*). They finally maintain that a "direct effect" was felt in this country because, during Joseph Cicippio's captivity, his employer, the American University in Beirut -- a corporation established under New York law -- continued to pay Mr. Cicippio's salary to his wife "without receiving services in return," and that "Mrs. Cicippio was forced to relinquish the moneys to Mr. Cicippio's captors in order to gain his release." (Pet. at 14).[6] -- These "effects" in the United States were impalpable with respect to the injuries petitioners asserted in the suit.

In consequence, the court below was correct in affirming the dismissal of petitioners' claims for lack of subject matter jurisdiction under the "commercial activity" exception to the FSIA.

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[6] Incredibly, in addressing these contentions, the petitions rely on the Eleventh Circuit's decision in *Nelson v. Saudi Arabia*, 923 F.2d 1258 (11th Cir. 1991), which this Court reversed in *Nelson*. Pet. at 13.

II. THE TORTIOUS CONDUCT OF IRAN'S ALLEGED AGENTS IN LEBANON DOES NOT SATISFY THE NON-COMMERCIAL TORT EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

Argentine Republic v. Amerada Hess, *supra*, 488 U.S. 428, teaches incontestably that the non-commercial tort exception to foreign sovereign immunity, codified in §1605(a)(5), does not apply to the tort claims asserted in this case, and that, in consequence, the district court was not competent to hear petitioners' intentional tort claims. The *Amerada Hess* Court squarely ruled that the FSIA's non-commercial tort exception *applies only to torts committed in the United States or its territorial waters.* That holding is dispositive of the intentional tort claims asserted here, since the tortious activities claimed to have been committed by Iran's operatives occurred in Lebanon, and petitioners suffered harm there. The court below, therefore, was right in affirming the dismissal of petitioners' intentional tort claims for lack of competence under the FSIA.

This issue, too, presents no occasion for the Court to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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